93-441

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

GULF COAST INDUSTRIAL WORKERS UNION,
Petitioner,

v.

EXXON COMPANY, USA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals for the
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit has properly articulated a public policy exception to the finality of arbitration awards in conformity with this Court's opinion in United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)?

2. Whether a public policy favoring the eradication of drugs from the workplace requires that the arbitration award rendered to the Petitioner and the Respondent be vacated?

3. Whether this Court should address the division among the United States Courts of Appeal regarding the application of the public policy exception to the finality of arbitration awards?

4. Whether the arbitrator exceeded his jurisdiction by considering post-termination conduct in his award?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Title Page	1
Report of Official Reports of Opinions	1
Statement of Jurisdiction	2
Contract Provisions	3
Statement of Case	3
Reasons for Granting the Writ	6
Argument	10

1. The United States Court of Appeals for the Fifth Circuit has not

properly articulated a public policy exception to the finality of arbitration awards consistent with the rulings of this Court. 10

2. A public policy favoring eradication of drugs from the workplace does not require that the arbitration award rendered to the Petitioner and the Respondent be vacated. 17

3. This Court should address the division among the United States Courts of Appeal regarding the application of the public policy exception to the finality of arbitration awards. 28

4. The arbitrator did not exceed his jurisdiction by considering post-termination conduct in his award. 42

Conclusion 49

Appendix

TABLE OF AUTHORITIES

CASES

	PAGE
Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983)	20
AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 106 S.Ct. 1415 (1986)	25
Delta Airlines v. Air Line Pilots Ass'n Intern., 861 F.2d 665 (11th Cir. 1988)	32
Interstate Brands v. Chauffeurs, Teamsters Local 135, 909 F.2d 885 (6th Cir. 1990)	20, 37, 38, 39, 40
John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964)	45

Oil Chemical Workers
Loc. 4-228 v. Union Oil
Co. of Cal., 818 F.2d 437
(5th Cir. 1987) - 35, 36, 37, 43

Northwest Airlines,
Inc. v. Air Line
Pilots Ass'n Intern.,
808 F.2d 76 (D.C. Cir. 1987) 28, 29, 30

Stead Motors v.
Automotive Machinists
Lodge 1173,
886 F.2d 1200 (9th Cir. 1989) 31, 32, 33, 34, 35, 49

United Paperworkers
International
Union v. Misco,
Inc., 484 U.S. 29,
108 S.Ct. 362,
98 L.Ed.2d 286 (1987) i, 7, 15, 16, 27, 31, 32, 33,
34, 41, 44, 45, 47, 50

United Steelworkers of
America v. American
Manufacturing Co., 363 U.S. 564,
80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960) 22, 23, 25

United Steelworkers
of America v. Enterprise
Wheel and Car Corp., 363 U.S. 593,
80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) 22 , 24, 25

United Steelworkers of
America v. Warrior & Gulf
Navigation Co., 363 U.S. 574,
80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) 22, 23, 25

W. R. Grace & Co.
v. Local Union No. 759,
461 U.S. 757, 103 S.Ct. 2177,
76 L.Ed. 2d 298 (1983) 32, 38

STATUTES

28 U.S.C. 185 4

28 U.S.C. 1254(1) 2

28 U.S.C. 1291 4

41 U.S.C. 701, *et seq.*,
Drug-Free Workplace Act 12, 13, 14

REGULATIONS

49 C.F.R. 199, *et seq.*,
Department of Transportation
Regulations 12, 13, 15, 30

TREATISES

Owen Fairweather, Practice and
Procedure in Labor Arbitration, (3rd ed. 1991) 46

ARBITRATION AWARDS

Hooker Chem. Corp., AAA Case No. 81-2
(Arb. Horvitz 1965) 46, 47

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Opinion Below

The opinion of the United States Court of Appeals, Fifth Circuit will be reported in 991 F.2d 244 (1993)(Copy of court's opinion - App. A, *infra,* pp. A-1 to A-72).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on May 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

Contractual Provisions Involved

The pertinent provisions of the contract involved are set forth in Appendix B, *infra*, pp. B-1 to B-29).

Statement

1. Background

This matter comes before the Court as the result

of an arbitration award issued to the Gulf Coast Industrial Workers Union ("GCIWU"), and Exxon Company, U.S.A. ("Exxon") by Arbitrator I. B. Helburn on August 23, 1991 (Appendix C, *infra,* pp. C-1 to C-33). The subject of the arbitration was the termination of an employee for alleged violation of Exxon's drug and alcohol policy; the employee, who was in the company's after-care program, tested positive for cocaine in a random drug screen. The arbitrator ordered reinstatement of the employee without backpay.

Following receipt of the award, Exxon notified GCIWU that it did not intend to abide by the award. The GCIWU filed a suit to enforce in the United States District Court for the Southern District of Texas, Houston

Division pursuant to 28 U.S.C. 185. Exxon filed a counter-claim seeking to vacate the award, charging that the arbitrator had exceeded his jurisdiction and that the award violated public policy.

The district court issued an order granting Exxon's counterclaim, vacating the award on December 11, 1991 (Appendix D, p. D-1 to D-2). The GCIWU perfected an appeal to the United States Court of Appeal, Fifth Circuit pursuant to 28 U.S.C. 1291. The appellate court issued an opinion on May 24, 1993, affirming the ruling of the district court (Appendix A).

2. Statement of Facts

The GCIWU and Exxon are signatories to a

collective bargaining agreement which provides for final and binding arbitration of disputes between the parties (Appendix B, pp. 24-28). The agreement also provides that Exxon may discipline or discharge its union-represented employees for just cause (Appendix B, pp. 20-21).

On June 15, 1990, Exxon terminated Thomas Woods, an employee represented by the GCIWU, for a violation of the drug and alcohol policy. Mr. Woods was in the company's after-care program and tested positive for cocaine in a random drug screen. The GCIWU grieved the discharge and the parties processed the dispute through the grievance and arbitration procedure contained in the contract.

At the arbitration hearing, Exxon and the GCIWU stipulated that the dispute was properly before the arbitrator. Arbitrator Helburn ruled that there was not just cause for discharge but that some level of discipline was appropriate. He ordered the grievant to be reinstated with no backpay. Exxon refused to abide by the award, thus prompting the enforcement action by the GCIWU.

Reasons for Granting the Writ

In this matter, the district court and the appeals court held that the arbitration award violated public policy because it ordered reinstatement of the grievant. The court also held that the arbitrator had improperly

relied upon post-termination conduct. These holdings are inconsistent with this Court's opinion in United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Moreover, there is a division among the federal appellate courts as to the proper application of considerations of public policy in enforcement proceedings for arbitration awards.

The lower courts also erred in ruling that the arbitrator exceeded his jurisdiction when he considered post-termination conduct. The arbitrator did nothing more than exercise his legitimate authority to fashion an appropriate remedy after finding that just cause did not exist for discharge.

The rulings by the lower courts in this matter destroy the integrity of the contract between the parties because they abrogate the negotiated agreement that the findings of an arbitrator concerning a dispute properly before him will be final and binding. Further, the rule announced in this case disrupts the peaceful, non-litigious resolution of disputes between unions and employers. If allowed to stand, the decision by the appellate court will render arbitration clauses a nullity in any case which involves drugs or alcohol, a result which is not consistent with the established labor law or the collective bargaining agreement between these parties.

Review by this Court is necessary to restore the integrity of the contract negotiated between Exxon and

the GCIWU and to afford recognition to the public policy of private resolution of labor disputes through the use of final and binding arbitration. The parties bargained for a system of resolving disputes which culminates in final and binding arbitration. Each party made an important concession to obtain that language - the union does not have the right to strike during the term of the agreement, and the employer may not lock out the union. Arbitration can only be an effective tool when it is final and binding and not subject to the kind of collateral attack which has occurred in the instant case. Moreover, review by this Court is required to achieve a uniform application of federal law in the intermediate federal court system regarding what has become an

extremely volatile and increasingly prevalent issue surrounding the impact of a public policy exception to the finality of arbitration awards.

ARGUMENT

I. The United States Court of Appeals for the Fifth Circuit has not properly articulated a public policy exception to the finality of arbitration awards consistent with the rulings of this Court.

The Fifth Circuit has chosen to abrogate the arbitration provisions of the contract between the parties on the ground that the award made by the arbitrator violates a "well defined and dominant" public policy (Appendix A, p. 56). In effect, the court has eviscerated the long-standing public policy of judicial deference to

arbitration awards by asserting a competing public policy regarding the eradication of substance abuse from the workplace.

In essence, the Fifth Circuit has articulated a public policy which says that an employee who has in the past violated an employer's rule prohibiting the use of illegal substances may never be returned to work with the employer by an arbitrator. The court cites a litany of statutes, regulations, and judicial decisions to substantiate its ruling. However, such a policy is not supported by the laws or cases cited by the court.

Exxon has instituted a drug and alcohol testing policy which recognizes a range of disciplinary actions when an employee is engaged in a rehabilitation effort

and has a single relapse, such as the grievant herein. (The lower court refers more than once to the employee having breached the drug abuse policy on two occasions; there was, in fact, only a single incident, a relapse which occurred in June of 1991.) As they are written, the rules implemented by Exxon regarding drug or alcohol abuse, are consistent with the public policy articulated by statutes such as the Drug-Free Workplace Act, 41 U.S.C. Section 701, *et seq.*, and the Department of Transportation regulations regarding pipeline workers, 49 C.F.R. Section 199, *et seq.*, which mandate the establishment of an employee education program about drugs and the implementation of assistance programs for those employees who suffer from addiction (see

particularly 41 U.S.C. Section 703(1), "grantee or contractor shall . . . require such employee to satisfactorily participate in a drug assistance or rehabilitation program . . ."; and 49 C.F.R. Section 199.1, "This part requires operators of pipeline facilities . . . to . . . provide an employee assistance program. . . .")

The lower court has not cited any statute or regulation which buttresses its holding that reinstatement under the circumstances of this case violates public policy. The Drug-Free Workplace Act, *supra*, does not require a finding that an employee who has tested positive for an illegal substance in the past may never work in an industry covered by the Act, nor

does it require termination for an employee who has tested positive. Rather, it requires an employer who is a government contractor to institute a drug awareness program including participation in substance abuse assistance and rehabilitation, and to establish a progressive discipline system, up to and including termination, for those employees who test positive for illegal drug use, 41 U.S.C. Section 703(1).

The Department of Transportation has promulgated regulations providing for the drug and alcohol testing of certain persons who work on petrochemical pipelines. Those regulations do not mandate that reinstatement is unavailable as a remedy in the case herein. The regulations provide only that

"An employee who refuses to take or does not pass a drug test may not return to duty until the employee passes a drug test administered under this part and the medical review officer has determined that the employee may return to duty." 49 C.F.R. Section 199.11(e). None of the other statutes cited by the court forbid the reinstatement of an employee who has suffers a single relapse and tests positive for an illegal substance.

The court of appeals cites as support for its holding this Court's ruling in Misco, *supra.* However, GCIWU submits that the mere recitation of a number of statutes which advocate the eradication of substance abuse from the workplace does not conclusively establish that, in this case a public policy has been

violated by the award of the arbitrator. In Misco, this Court made it clear that an examination must be made as to whether an arbitrator's award creates any explicit conflict with other laws and legal precedents, *id.*, at 108 S.Ct. 373. It is doubtful that Exxon could articulate or this Court could accept that there is a public policy which holds that an employee who suffers from drug addiction can never be rehabilitated or be reinstated to his former position. That is the public policy Exxon would have this Court pronounce.

2. **A public policy favoring the eradication of drugs from the workplace does not require that the arbitration award rendered to the Petitioner and the Respondent be vacated.**

In its attempt to apply the public policy exception to this matter, the Fifth Circuit has engaged in impermissible fact-finding, thus usurping the province of the arbitrator. (In a footnote to its opinion, Appendix A-5, the Fifth Circuit speaks of its frustration with the fact that no transcript of the arbitration hearing was provided; that is because the parties as a rule do not seek transcription of arbitration proceedings and did not do so in this dispute.) The court recognized the danger of infringing upon the authority of the arbitrator, stating:

GCIWU argues that the record evidence

> contains no indication of Woods' duties at the refinery, but does not dispute Exxon's assertion that Woods was freely transferrable to these potentially hazardous assignments. *Although we are cautioned against usurping the arbitrator's task of finding facts and drawing inferences, our public policy inquiry permits us to consider this established evidence even though it may not have been considered by the arbitrator.*

(Appendix A-5, ftnt. 1)(Emphasis added.)

Thus, to reach the result it desired, the court not only misapplied the public policy exception, it also invaded the exclusive province of the arbitrator in order to to do so. There was, in fact, no "established evidence" in the record such as that described by the court; instead, there was only a statement made at oral argument by counsel for the Respondent, and a single sentence in the brief presented to the court concerning

the grievant's job duties. At the argument of this matter before the court, counsel for the GCIWU vigorously contested the statement about job duties made by Exxon's counsel.

The court again encroached upon the authority of the arbitrator when it concluded:

> The record does not show that Woods was impaired while on duty or that he used cocaine on Exxon's premises. This circumstance, however, does not control in light of Woods' sensitive position and his attempts to conceal his drug use. Woods' duplicity in hiding his violation of the after-care agreement obviously increases the risk of future violations.

(Appendix A-53)

The federal courts have made it clear that the finding of facts and the drawing of inferences from those

facts is the exclusive province of the arbitrator, see, *e.g.*, Interstate Brands v. Chauffeurs, Teamsters Local 135, 909 F.2d 885, 894 (6th Cir., 1990). In the Interstate Brands case, the Sixth Circuit ruled that the district court engaged in impermissible fact-finding when it concluded that because of the criminal charges against the grievant, it was likely that he had been in the past and would be in the future under the influence of drugs or alcohol while at work.

The Fifth Circuit held in Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122, 123 (5th Cir. 1983), that it would not review the factual findings or merit determinations made in an arbitration award. In this case, the court has engaged in precisely

that kind of improper fact-finding and merit determinations in order to conclude that the grievant cannot be reinstated because of a public policy. Moreover, the court has completely discounted the findings of the arbitrator as to the "risk of future violations." The arbitrator found that risk to be slight, warranting reinstatement as the appropriate remedy.

GCIWU submits further that, in seeking to enforce one public policy, the court has seriously impaired another, longer-standing public policy of encouraging peaceful labor relations through the use of arbitration. It is clear that the policy is firmly established in this country that federal courts do not have jurisdiction to determine the merits of a grievance arising under a

collective bargaining agreement containing a provision for final and binding arbitration. The parameters for a court's jurisdiction was established in a series of cases, the Steelworkers Trilogy: United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In American Manufacturing, the first of the cases, the union sought to compel arbitration of a grievance which arose under the collective bargaining agreement. The lower courts had

refused to compel the arbitration on the ground that the contract language involved was not susceptible to the interpretation being advanced by the union. This Court reversed the lower court, reasoning at 363 U.S., 567-9:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

In the second of the Trilogy cases, Warrior and Gulf Navigation, the Court announced a presumption of arbitrability at 363 U.S., 582-3:

> An order [by the Court] to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration

> clause is not susceptible of an interpretation that covers the concerted dispute. Doubts should be resolved in favor of coverage.

The third case, Enterprise Wheel, addressed the issue of the scope of judicial review of an arbitrator's award, finding that the role of a court is a very limited one. In that case, the employer refused to implement the award of an arbitrator, claiming that the arbitrator failed to apply correct principles of law to the interpretation of the collective bargaining agreement. The Supreme Court rejected this contention stating at 363 U.S, 589-9:

> The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the

> merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

In 1986, the Supreme Court reiterated support for the finality of the arbitration process in the case of AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 106 S.Ct. 1415 (1986), when it again considered the role of the courts:

> The principles necessary to decide this

> case are not new. They were set out by this Court over 25 years ago in a series of cases known as the Steelworkers Trilogy . . . . These precepts have served the industrial relations community well and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

(Cites omitted.)

Misco affirmed yet again the judicial deference to arbitration awards even where a public policy exception is argued. The Steelworkers Trilogy and its progeny determined that the public policy favoring the private resolution of disputes between labor and management is largely achieved by the grant of judicial deference to

arbitration decisions. In this case, Exxon specifically told the arbitrator that the dispute was properly before him, and there is no public policy which mandates that a positive drug test in the past renders an individual incapable of future employment in the same position.

The GCIWU is not arguing that in no instance of a violation of Exxon's drug testing policy is termination appropriate. It is arguing that the findings and the conclusions of the arbitrator in this case are consistent with a public policy designed to eradicate drugs from the workplace and with the public policy which encourages the private resolution of labor disputes. The GCIWU submits that the decision of the Fifth Circuit is inconsistent with this Court's rule in the Misco decision

and does nothing to advance either of the public policies articulated above.

3. **This Court should address the division among the United States Courts of Appeal regarding the application of the public policy exception to the finality of arbitration awards.**

It is imperative that this Court address the division among the circuit courts on the issue of the application of the public policy exception in cases involving the arbitration of terminations. In this regard, at least three circuits have found that considerations of public policy do not warrant abrogation of an arbitrator's award ordering reinstatement.

In Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Intern., 808 F.2d 76 (D.C. Cir. 1987), the employer fired

a pilot who violated the FAA regulation against consuming alcohol within twenty-four hours of a flight. The court upheld the award of the System Board of Adjustment, reinstating the pilot conditioned upon recertification by the FAA, *id.*, at 78. The court went on to find that, while it understood the employer's need to apply reasonable safety rules to pilots, there was nothing in the collective bargaining agreement which removed disciplinary action based on the violation of a safety rule form the arbitration process, *id.*, at 81-82. The Fifth Circuit distinguishes this case on the ground that a federal agency was involved in recertifying the pilot after rehabilitation. Petitioner is not certain why this distinction renders the reasoning of the court in

Northwest Airlines as to the importance of judicial deference to arbitration awards, inapplicable herein, particularly when the arbitrator conditioned this grievant's reinstatement on a negative drug screen, a requirement which is in conformance with the pipeline regulations of the Department of Transportation, 49 C.F.R. 199.11(e). In like fashion to the Northwest Airlines case, there is nothing in this case which prevents reinstatement - no law is violated thereby, and there is nothing in the collective bargaining agreement, in the drug policy of the employer, in the after-care agreement to which the grievant was subject, or in the stipulations presented to the arbitrator indicating that this dispute could not be resolved through arbitration. If

the court takes the position that the arbitrator can only reach the same conclusion as the company - that termination is mandatory and the arbitrator has no authority to render a different remedy - that is the same as saying that the dispute was not arbitrable in the first place. Exxon has not alleged that to be the case, nor does the record support such an argument.

In the case of Stead Motors v. Automotive Machinists Lodge 1173, 886 F.2d 1200 (9th Cir. 1989), the court considered the rationale of Misco in deciding whether it would enforce an award reinstating an auto mechanic. The court made it clear that the question to be answered is not whether there is a public policy against a particular sort of behavior in society in general;

it is whether the reinstatement of an individual who has engaged in that kind of behavior in the past would violate public policy. The Stead court ruled that such *past* behavior did not violate the public policy it was addressing. That court also found the ruling in Delta Airlines v. Air Line Pilots Ass'n Intern., 861 F.2d 665 (11th Cir. 1988), cited with approval by the appellate court herein, to be simply inconsistent with the law as expressed by Misco and W.R. Grace & Co. v. Local Union No. 759, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), Stead, at 1215-17.

In its analysis of the public policy exception, the Stead court stated further, at 1213:

> Ordinarily, a court would be hardpressed

to find a public policy barring reinstatement in a case in which an arbitrator has, expressly or by implication, determined that the employee is subject to rehabilitation and therefore not likely to commit an act which violates public policy in the future. . . . Judgments about how a specific employee will perform after reinstatement if given a lesser penalty are nothing more than an exercise of the arbitrator's broad authority to determine appropriate punishments and remedies. *See Misco, 108 S.Ct. at 372* . . . . This rule is supported by the significant societal interest in the rehabilitation of workers who err in the workplace. All of us benefit from employees who perform their jobs safely and properly. All of us suffer when potentially productive workers are relegated to the unemployment lines.

* * *

As we explained *supra* at 1215, we reject the approach of the Eleventh Circuit that, simply because an employee has committed some act which violates a law or a public policy in the course of his employment, his reinstatement would also necessarily violate that public policy. This argument is fallacious, reflecting precisely

> the analytical error in Stead Motors' argument here, for it is only if the grievant is likely to engage in wrongful conduct which violates public policy in the future that his reinstatement could be said to violate public policy. If we assume the public policy posited by the original panel's opinion, it may be true that Rocks' conduct ran afoul of it in the past. But we are not free to assume that Rocks would, if appropriately disciplined, run afoul of it in the future. As we have emphasized throughout, it is the function of the arbitrator, not the courts, to make assessments with respect to appropriate punishments and to determine the likelihood of rehabilitation - a judgment whether the grievant will engage in future wrongdoing.

The court below discounts the decision in Stead because it does not involve drugs and because there was a plurality of opinions. However, GCIWU submits that the analysis of the majority in Stead is sound and in conformity with Misco. Both Stead and the instant case

involve public policy considerations surrounding reinstatement of an employee who is perceived as a danger to the safety of the workplace and the public. Thus, the reasoning of the court in Stead has direct applicability to this matter.

The Fifth Circuit was itself faced with a public policy argument similar to the one it considered herein in the case of Oil Chemical Workers Loc. 4-228 v. Union Oil Co. of Cal., 818 F.2d 437 (5th Cir. 1987). In that case, the court upheld an arbitrator's award reinstating an employee who was fired for drug-related offenses. The union had argued that public policy actually supported the reinstatement of the employee because it favors rehabilitation of those addicted to drugs. The

Fifth Circuit held:

> [T]the arbitrator found the probability that Chester's off-premises drug use would hinder or be involved in her performance on the job in the future was too low to merit discharge. Off-duty/off-premises conduct involving the illegal use and sale of drugs is not *per se* justification for a worker's discharge. The collective bargaining agreement provides for binding arbitration. It was within the discretion of the arbitrator in Chester's case to credit the public policy favoring drug rehabilitation and find that Chester no longer used drugs and would not present a safety risk in the future. Based on the facts available at the time of the arbitrator's decision, enforcement of the arbitrator's award would not have violated public policy.
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> * * *

Here the parties bargained for the arbitrability of discharge grievances. The union and the company agreed that an arbitrator would determine whether an employee's termination was for just cause. Chester won her award. The arbitrator found the probability of an alleged

> safety risk so low as not to justify discharge. In deference to the arbitrator's ruling, we will not preempt his February 1985 findings.

Id., at 442-443.

The Sixth Circuit has also considered the impact of the public policy exception on arbitrations awards. In Interstate Brands, *supra*, the court was confronted with an arbitration award reinstating a truck driver/salesman who was indefinitely suspended because of an arrest for the off-duty possession of cocaine, marijuana, and drug paraphernalia. The grievant told the arresting officer that he was attempting to shoot up cocaine when the officer arrived on the scene. The arbitrator returned the grievant to his job and the employer sought to vacate

the award. The district court ruled that the "reinstatement violated a well-defined public policy against permitting habitual users of mind-altering illegal drugs from operating motor vehicles." *Id.*, p. 888. The Sixth Circuit reversed, holding, at 893:

> . . . the district court also mischaracterized the public policy issue. A careful reading of the district court's opinion reveals that it was in actuality evaluating Furst's behavior. The issue is not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather the award requiring the reinstatement of a grievance (*sic*), i.e., "the contract as interpreted," *W.R. Grace,* 461 U.S. at 766, 103 S.Ct. at 2183, violated some explicit public policy.
>
> * * *
>
> As discussed above, there is no law or regulation

which mandates that an individual who has tested positive for an illegal substance in the past may not be returned to his job under any circumstances. Instead, there is a bargained-for provision between Exxon and the GCIWU which gives an arbitrator the authority to make the determination, in light of all of the circumstances of the case, as to whether a discharge is for just cause, and if not, what the appropriate remedy is.

The Sixth Circuit also based its decision on the fact that the district court had

> engaged in impermissible fact finding in basing its decision to vacate Furst's reinstatement in part upon the evidence excluded by the arbitrator; namely Furst's conviction for reckless driving and driving under the influence . . . .

> Finally, to conclude from the fact that Furst had been indicted for possession of cocaine, marijuana and drug paraphernalia, that Furst had ever been or would be in the future under the influence of drugs or alcohol while driving a bread truck was also an exercise in fact finding, a function the district court was not authorized to perform.

Id, at 894, cites omitted.

The Fifth Circuit has overstepped the very bounds described in Interstate Brands, by finding that there was an increased risk of future violations of the drug testing policy by the grievant. This finding is not supported by the evidence and is directly contrary to the findings of the arbitrator who determined that the grievant was a good candidate for rehabilitation and was a credible witness. Further, there is absolutely no

evidence in the record that the grievant ever worked under the influence of drugs or alcohol. The Fifth Circuit has merely substituted its interpretation of the evidence for that of the arbitrator and has improperly found that the grievant would engage in the wrongful conduct in the future. The court is not permitted to engage in such fact-finding.

The GCIWU submits that the rulings in the above-described cases reflect the correct interpretation of this Court's ruling in Misco, and that the holdings of the Fifth and Eleventh Circuits are inconsistent. In light of this inconsistency, the GCIWU believes that this Court must address the disparity among the circuits on the issue of public policy as it applies to discharges on

the basis of drug or alcohol abuse.

4. **The arbitrator did not exceed his jurisdiction by considering post-termination conduct in his award.**

Finally, the GCIWU submits that the arbitrator did not exceed his jurisdiction when he considered post-termination conduct of the grievant. The arbitrator ruled first that nothing in the collective bargaining agreement or the drug testing policy required termination for a first offense. Then he found that termination was too harsh a punishment in this case, and fashioned a remedy based on a number of different factors, including the work history of the grievant, his credibility when

testifying, whether progressive discipline had been administered, whether the source of his problem was being addressed, and the testimony of the GCIWU's expert witness as to the effect of a single relapse in a rehabilitation program. The arbitrator found that the grievant was a good candidate for rehabilitation based on those factors. He then looked at the grievant's post-termination conduct to determine whether reinstatement was an appropriate remedy.

Interestingly enough, the Fifth Circuit remanded the case of Union Oil, *supra,* to the arbitrator with specific instructions to reconsider his just cause finding in light of the grievant's post-termination conduct, i.e., her continued use of drugs. *Id,* at 443. In so doing, the

court was merely recognizing that, unlike other cases of termination, cases involving substance abuse require that the arbitrator go beyond the facts known at the time of termination in order to fashion an appropriate remedy. That is the only way the arbitrator can make a reasoned determination as to what remedy will best serve the interests of all parties.

The lower court herein relies on Misco as supportive of its holding that the arbitrator exceeded his jurisdiction by considering evidence of post-termination conduct. That reliance, however, is misplaced. The Misco Court did not determine whether an arbitrator should or should not consider post-termination evidence; rather, the Court held that the arbitrator had

the authority to construe the contract as to what evidence the arbitrator may consider when deciding a discharge case. The Court found the arbitrator's action "was consistent with our observation in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557 (1964), that when the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator."

The Fifth Circuit also pointed to a footnote in the Misco case, 484 U.S. at 40, ftnt. 8, as supportive of its position. Again, the court reads the comments of the Court too broadly. This Court merely remarked that arbitrators often, *but not always,* confine their

considerations to the facts known at the time of the discharge.

In Owen Fairweather's treatise, Practice and Procedure in Labor Arbitration, 260-262 (3rd ed. 1991), the author discusses cases in which an arbitrator may legitimately consider post-termination evidence. He specifically refers to an award issued by Arbitrator Aaron Horvitz, Hooker Chem. Corp., AAA Case No. 81-2 (1965) which states:

> If . . . the case must be viewed and should be decided solely as to the facts as they existed as of the date of discharge, I would have no choice but to sustain the employer's action. But the company's position, it seems to me, is not sound under the circumstances and is in conflict with the weight of estimable arbitrable authority . . . [M]edical authority . . . agrees that alcoholism is a disease in the same sense as many other

> afflictions which are beyond the capacity of the individual to control except through outside help and treatment. If the grievant had been discharged for excessive absenteeism and poor work caused, let us say, by an aggravated ulcer condition, which condition had been cured or relieved by surgery between the time of discharge and the time of arbitration, it is clear to me that I would have the right to consider the prognosis as of the time of the arbitration in reaching a decision.

Arbitrator Horvitz went on to state that if an arbitrator could not consider post-termination evidence in such a case, "it would render rehabilitation, in many cases, a meaningless effort." As this Court held in Misco, at 484 U.S., p. 39, [T]he parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators to follow if they chose."

As the Petitioner has pointed out throughout this case, Exxon never told the arbitrator he could not consider post-termination conduct, nor did it object to the admission of such evidence. The district court and the Fifth Circuit usurp the arbitrator's authority when they rule that he could not determine what evidence he would hear in this matter.

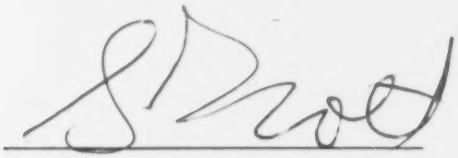
Arbitrator Horvitz made a cogent point about the consideration of post-termination conduct in a case involving substance abuse. The arbitrator herein made a determination that discharge was inappropriate in this case, based on a number of factors. The Petitioner believes he would have been negligent in his duties had he not considered the conduct of the grievant since his

discharge in assessing the appropriate penalty. The better statement of the law on this point is that made by the Ninth Circuit in Stead, at 1213: We apply the same deferential review to an award's statements concerning rehabilitation that we apply to other aspects of the award.

CONCLUSION

This Court should review this case because the decision of the lower court undermines the long-established public policy favoring the peaceful resolution of labor disputes through the use of final and binding arbitration, and is not consistent with this Court's ruling

in Misco regarding the proper fashioning of a public policy. The Court should also review this case because of the conflicts between the federal circuit courts of appeal as to the impact of a public policy exception to the finality of an arbitration award.



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NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1993

GULF COAST INDUSTRIAL WORKERS UNION,
Petitioner,

v.

EXXON COMPANY, USA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals for the
Fifth Circuit

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
APPENDIX A: Opinion of Fifth Circuit Court of Appeals	A1 - A72
APPENDIX B: Relevant Contract Provisions	B1- B29
APPENDIX C: Arbitration Award Of I. B. Helburn	C1 - C33
APPENDIX D: Judgment of United States District Court For the Southern District of Texas	D1 - D2

APPENDIX A

GULF COAST INDUSTRIAL WORKERS UNION, Plaintiff-Appellant,

v.

EXXON COMPANY, U.S.A., Defendant-Appellee.

No. 91-6374.

United States Court of Appeals, Fifth Circuit.

May 24, 1993

Appeal from the United States District Court for the Southern District of Texas.

Before WILLIAMS, HIGGINBOTHAM, and

APPENDIX A

BARKSDALE, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Thomas Woods wants his job back. He lost it when he tested positive for cocaine, a clear violation of Exxon's Alcohol and Drug Use Policy and its after-care program. The district court refused to enforce an arbitration award instructing the company to reinstate him. The court held that the arbitrator's ruling was doubly defective because (1) it offended public policy by ordering the reinstatement of a proved drug abuser to his safety-sensitive position, and (2) the arbitrator

exceeded his authority by relying upon Woods's post-discharge conduct. We agree with the district court on both counts and affirm the summary judgment in favor of Exxon.

I. FACTS AND PRIOR PROCEEDINGS

This appeal is somewhat unusual for a disciplinary case in that the parties are in complete agreement regarding the underlying facts. For the most part, they are straightforward and largely stipulated.

Exxon Company, U.S.A. ("Exxon") employed Thomas W. Woods, the grievant, as a process technician at its Baytown, Texas petro-chemical refinery.

Woods was not a desk-bound employee. As a process technician, he was freely transferable into assignments involving the supply of electricity, steam, water, and nitrogen to other parts of the plant. These volatile gases and liquids are produced and handled at extremely high temperatures and pressures.[1]

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[1] GCIWU argues that the record evidence contains no indication of Woods's duties at the refinery, but does not dispute Exxon's assertion that Woods was freely transferable to these potentially hazardous assignments. Although we are cautioned against usurping the arbitrator's task of finding facts and drawing inferences, our public policy inquiry permits us to consider this established evidence even though it may not have been considered by the arbitrator. *See United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 44, 108 S.Ct. 364, 374, 98 L.Ed.2d 286 (1987); *Chrysler Motors v. International Union,* 959 F.2d 685,

APPENDIX A

Woods is a member of the Gulf Coast Industrial Workers Union ("Union" or "GCIWU") which, along with Exxon, is signatory to a collective bargaining agreement covering disputes between the parties. As with most agreements, it authorizes Exxon to discipline or discharge its employees for just cause and provides for

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689 n. 4 (7th Cir. 1992).

We take this opportunity, however, to highlight a frustrating difficulty with this case. In discussing the record, both parties make numerous references to what transpired at the arbitration hearing. The hearing transcript, however, was never entered into the record and is not before us on appeal. Since both Exxon and the Union reference the arbitration hearing, we take judicial notice of those portions of the transcript to which the parties refer pursuant to Fed.R.Evid. 201. *See generally* 10 MOORE'S FEDERAL PRACTICE SECTION 201.60 (1988).

final and binding arbitration of unsettled employee grievances. Article 26, Section B of the agreement provides: "The Company shall have the right to discipline and discharge employees for just cause. The commission of the offenses listed in Schedule C [including drug use] shall be just cause to render an employee liable to discharge on first offense."

Since January 1990, Exxon has also had in place a comprehensive Alcohol and Drug Use Policy that, while recognizing drug dependency as a treatable condition and encouraging troubled employees to seek help, "absolutely prohibit[s]" a worker from using or being under the influence of controlled substances on

the premises. Any violation of the Policy is "cause for termination of employment." The Policy also requires workers who have completed programs for substance abuse or alcoholism to participate in a mandatory five-year after-care program. Among other things, the after-care contract requires total abstinence from all alcohol and non-prescription, controlled drugs. Employees are instructed what actions to take if a relapse occurs or if stress threatens to endanger the worker's sobriety. The contract also authorizes unannounced and periodic random drug/alcohol testing for the entire five-year duration of the after-care program. A positive test result is grounds for disciplinary action, including termination.

If the employee follows the instructions, he may receive a second chance. If he fails to comply, he faces possible termination.

In April 1990, Woods voluntarily informed his supervisor at Exxon that he had recently participated in a 30-day, alcohol-rehabilitation program. In accordance with the stated Policy, Woods met with management to fashion his after-care program. Woods agreed to forego all alcohol and non-prescription drugs and to notify his supervisor or a counselor in case of relapse. In addition, Woods acknowledged that Exxon would perform random tests for drugs and alcohol throughout the five-year period. He signed an agreement, which

provided in part:

> I have read Exxon's Alcohol and Drug Use Policy. The policy requires me to submit to periodic alcohol and drug testing at the Company's request. I understand I will be subject to periodic and unannounced alcohol and drug testing for a period of 60 months . . . . I understand that a positive alcohol or drug test result or refusal to submit to periodic testing is grounds for discipline as referenced in Exxon's Alcohol and Drug Use Policy.

The Policy then-effective provided that the "use . . . of illicit or unprescribed controlled drugs . . . is strictly

prohibited and is grounds for termination."

Less than two months into the after-care program, Woods tested positive for cocaine.[2] In violation of the agreement, however, Woods had failed to notify anyone of his relapse. Moreover, he never admitted using cocaine until the test results came back positive, three days *after* the test was administered. Exxon immediately fired Woods for violating its Alcohol and Drug Use Policy and for breaching the after-care

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[2] The Union does not dispute the testing process used, the chain of custody, or the accuracy of the positive results. Moreover, the parties note that the findings do not indicate the degree of impairment, if any, when the drug was used, or the amount ingested.

agreement in using cocaine and also in failing to report his relapse.

The Union filed a grievance contesting the termination. After the earlier steps in the grievance process failed, GCIWU invoked arbitration.[3] A single issue was submitted to the arbitrator: "Was Thomas W. Woods discharged for just cause and, if not, what is the proper remedy?" Noting that violation of the after-care agreement does not mandate automatic termination, the arbitrator held that summary discharge was unjustified and too harsh a penalty. Instead, he sustained the

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[3] The parties stipulate that the grievance was properly before the arbitrator.

grievance and directed Exxon to reinstate Woods to his previous job without backpay contingent upon a negative drug and alcohol screen.[4] The arbitrator said in his opinion that while there was "no question that the Company had just cause to discipline Woods," the grievant seemed a "good bet for successful rehabilitation."

When Exxon informed Gulf Coast that it did not intend to abide by the award, the Union instituted this suit to enforce the award. Exxon counter-claimed to

[4] Given the lag between Woods's discharge and the arbitrator's decision, the practical effect of the award was a suspension of over one year.

vacate the award asserting that it violated sound principles of public policy in directing the reinstatement of Woods to his safety-sensitive position and also that the arbitrator had exceeded his authority by basing his decision upon Woods's post-discharge conduct.

Upon cross-motions for summary judgment, the district court granted Exxon's requested relief and vacated the arbitration award. Gulf Coast timely appealed.

II. DISCUSSION

[1,2] In reviewing a summary judgment, we employ the same standard used by the district court. *Netto v. Amtrak*, 863 F.2d 1210, 1212 (5th Cir. 1989).

Since the facts are undisputed here, our sole mission is to determine whether "the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). Accordingly, we review *de novo* the district court's order to vacate the arbitration award. *Forsythe Intern., S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1020-21 (5th Cir. 1990).

[3] In making this determination, we recognize that federal courts defer to the arbitrator's resolution of the dispute "whenever possible." *Anderman/Smith Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990), *cert. denied*, _____U.S. _____, 111 S.Ct. 2799, 115 L.Ed.2d 972 (1991). Congress's decided

preference for arbitration, as reflected in federal statutes regulating labor-management relations, establishes a standard of review that is highly deferential to the arbitrator's bargained-for judgment.

[4,5] Notwithstanding this admonition, however, arbitration awards are not inviolate. We properly review arbitration awards to determine whether the award "stems from fraud or partiality; . . . concerns a matter not subject to arbitration under the contract; . . . does not 'dra[w] its essence' from the contract; . . . or . . . violates public policy." *Manville Forest Prod. v. United Paperworkers Intern.*, 831 F.2d 72, 74 (5th Cir. 1987). In this background we consider the two alternative

grounds Exxon asserts for vacating the award.

A. "Well Defined and Dominant" Public Policy[5]

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[5] We reject the Union's argument that Exxon somehow waived its public policy argument by agreeing to arbitration and/or by not advancing it before the arbitrator. Under the terms of the collective bargaining agreement, the company had no choice but to arbitrate the grievance after earlier proceedings were exhausted. In any event, courts are the ultimate arbiters of public policy, not arbitrators. *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983); *see Iowa Elec. Light & Power v. Local Union 204,* 834 F.2d 1424, 1427 (8th Cir. 1987)("Because collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements, 'the question of public policy is ultimately one for resolution by the courts.'")(quoting *W.R. Grace,* 461 U.S. at 766, 103 S.Ct. at 2183).

Indeed, *had* the arbitrator below relied upon public policy in reaching his decision, *that,* in some holdings, is considered error. *Local No. P-1236 v.*

[6] Exxon argues the well-settled rule that, as with any other contract, arbitration awards are subject to challenge if they violate public policy. *United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 42, 108 S.Ct. 364, 373, 98 L.Ed.2d 286 (1987). As the Supreme Court there explained, a court's refusal to enforce an award that is contrary to public policy is little more than "a specific application of the more general doctrine, rooted in the common law, that a court may

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Jones Dairy Farm, 680 F.2d 1142, 1144 (7th Cir. 1982)("When an arbitrator bases his award on public policy considerations, he has overstepped his authority and the court may review the substantive merits of the award.")

refuse to enforce contracts that violate law or public policy." 484 U.S. at 42, 108 S.Ct. at 373.

Misco is the leading and dominant case setting out the rules applicable to reviewing arbitration awards on public policy grounds. In *Misco*, an employee at a paper converting plant was discharged after police apprehended him in a co-worker's car that was filled with marihuana smoke. The company asserted that being in a car with a lit marihuana cigarette violated the plant's rule against having an illegal substance on company property. The arbitrator upheld the grievance and ordered reinstatement. As in the instant case, the company attempted to vacate the arbitration award on

several grounds, including the argument that reinstatement was offensive to public policy. The district court agreed that the award must be set aside because it contravened general safety concerns that arise from the operation of dangerous machinery while under the influence of drugs, as well as state laws proscribing drug possession.[6] A divided panel of this Circuit affirmed, reasoning generally that workplace safety militated against restoring the worker to his hazardous job. The Court articulated the policy violated merely as "one

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[6] The employee operated a slitter-rewinder machine, a hazardous object that uses sharp blades to cut rolling coils of paper.

against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Misco v. United Paperworkers International Union, AFL-CIO,* 768 F.2d 739, 743 (5th Cir. 1985).

[7] The Supreme Court reversed our decision which had upheld vacating the worker's reinstatement. The Court relied upon two reasons. First, our judicially-noticed public policy formulation, although "firmly rooted in common sense," was insufficient to support the Court's vacating the arbitration award because it ignored the requirement of *W.R. Grace* that a reviewing court must, as a necessary first step, identify with specificity the existing laws and legal precedents underlying its

decision. *W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983). The Supreme Court re-emphasized in *Misco* that, when applying the narrow public policy exception, courts are forbidden to use imprecise notions of public policy which would allow ill-defined considerations to negate the rule favoring judicial deference. "At the very least," wrote Justice White, "an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced." 484 U.S. at 43, 108 S.Ct. at 373. Second, even assuming the existence of such a policy, the record evidence in

Misco failed to demonstrate that the employee had actually operated dangerous machinery while impaired.

[8] The dictates of *Misco* must resolve the parties' public policy arguments. Although the public policy exception to our usual deference is not to be invoked lightly, a court may exercise its judicial power to abrogate a private agreement when, for example, it gives short shrift to the public's important yet unrepresented interests. When such violations are alleged, we enjoy more latitude in reviewing the arbitrator's decision. As the Supreme Court held in *W.R. Grace*, the question of public policy is wholly independent from the collective bargaining agreement

and "is ultimately one for resolution by the courts." 461 U.S. at 766, 103 S.Ct. at 2183. In such instances, reviewing courts resolve the issue by "taking the facts as found by the arbitrator, but reviewing his conclusions de novo." *Iowa Elec. Light & Power v. Local Union 204,* 834 F.2d 1424, 1427 (8th Cir. 1982); *E.I. DuPont de Nemours v. Grasselli Emp. Ass'n,* 790 F.2d 611, 617 (7th Cir.), *cert. denied,* 479 U.S. 853, 107 S.Ct. 186, 93 L.Ed.2d 120 (1986).

[9] In the instant case, the district court relied exclusively upon the "common sense" basis for refusing to reinstate Wood. [*sic]* While speaking generally about the public's interest in a safe workplace free of alcohol-

and drug-abusers, the court did not ground its decision upon an articulated review of laws and legal precedents that frown upon the reinstatement of such employees.

[10,11] We do not focus upon whether Wood's *[sic]* underlying conduct violates public policy. It obviously does. Rather, under *Misco* the courts must detail specifically the official measures establishing the policy upon which it relies. After such an inquiry, we hold that it offends public policy for Woods, an employee who occupies a safety-sensitive position, to retain his job upon testing positive for cocaine while on the job and after having breached his company's drug abuse policy on two occasions - first when he broke his pledge

of abstinence, and second when he failed to disclose his relapse. To be sure, public policy clashes unmistakably with Woods's use of a controlled substance. We find that it is contrary to the arbitration award as well.[7]

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[7] In a footnote, the *Misco* Court declined to address the issue of whether invocation of the public policy doctrine requires a showing that the "award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n. 12, 108 S.Ct. at 374-75 n. 12. Legal authority generally holds that a court need not find that the award itself is illegal before overruling an arbitrator on public policy grounds. *See* R. GORMAN, LABOR LAW - UNIONIZATION AND COLLECTIVE BARGAINING, 597 (1982)(stating that an award may be vacated when it, "although not requiring illegal conduct, is said to be inconsistent with some significant public policy"); *see also, e.g., Grasselli,* 790 F.2d at 616; *Iowa Elec.,* 834 F.2d at 1427-28 n. 3; *U.S. Postal Ser. v. American Postal Workers Union,* 736 F.2d

APPENDIX A

There are countless statutes, regulations, company guidelines, and judicial decisions that pronounce the emphatic national desire to eradicate illicit drugs from he workplace. Every day, legislatures, agencies, and courts reflect our intolerance of

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822, 824 (1st Cir. 1984). *But see, e.g., American Postal Workers v. United States Postal,* 789 F.2d 1, 8 (D.C. Cir. 1986)(upholding an award reinstating a worker who admitted to mishandling mail because reinstatement did not violate positive law or otherwise compel illegal conduct). Although these authorities, with the exception of *Iowa Electric*, are pre-*Misco*, nothing in the Supreme Court's decision mandates a contrary result. Indeed, refusing to vacate an arbitration award unless it violates some manifestation of positive law would be difficult to square with "the more general doctrine . . . that a court may refuse to enforce contracts that violate law *or* public policy." *W.R. Grace,* 461 U.S. at 766, 103 S.Ct. at 2183 (emphasis added).

substance abusers and the astronomical costs - both human and financial - associated with their behavior. As other cases have done, we proceed to highlight the various legal sources reflecting our nation's "well defined and dominant" desire for a drug-free society.

1. *federal statutes*

The 1988 Drug-Free Workplace Act, 41 U.S.C. Sections 701-707, post-dates *Misco*. It mandates drug-free workplace requirements for federal contractors. Under this Act, to which Exxon is bound as a government contractor, "[n]o person . . . shall be considered a responsible source . . . for the purposes of being awarded a contract for the procurement of any

property or services of a value of $25,000 or more from any Federal agency unless such person has certified to the contracting agency that it will provide a drug-free workplace[.]" *Id.* Section 701(a)(1). The Drug-Free Workplace Act also requires private employers with federal contracts to (1) publish a statement notifying their workers that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace, (2) notify the employees that their continued employment hinges upon compliance with the policies outlined in this statement, and (3) establish a drug-free awareness program to inform their employees of the "dangers of

drug abuse in the workplace." *Id.* Section 701(a)(1)(A)-(D). A company's failure to comply with the Act subjects the company's federal contract to possible termination.

In the case of grievant, Thomas Woods, there was no showing that he possessed or used cocaine on the premises. But this is no longer a critical distinction. According to Exxon, it is also bound as a government contractor, to comply with the Defense Department's regulations mandating a drug-free workplace. 48 C.F.R. 223.5(1992)(stating the Department's policy "to ensure that its contractors maintain a program for achieving a drug-free work force" since a contractor's employee's use of illegal drugs *"at any time"* can "(1) Impair their

ability to perform tasks that are critical to proper contract performance [and]; (2) Increase the potential for accidents and for failures that can pose a serious threat to the national security, health, and safety[.]")(emphasis added). A companion regulation voices a similar position:

> Contractors shall adopt appropriate personnel procedures to deal with employees who are found to be using drugs illegally. Contractors shall not allow any employee to remain on duty or perform in a sensitive position [defined in part as a job impacting health or safety or requiring a high degree of trust or

> confidence] who is found to use illegal drugs until such times as the Contractor, in accordance with procedures established by the Contractor, determines that the employee may perform in such a position.

48 C.F.R. 252.223-7004(d)(1992).

The recently enacted Americans with Disabilities Act ("ADA"), 42 U.S.C. Sections 12101-12213, is also instructive. While broadening employment opportunities for millions of disabled workers, the ADA affirmatively excludes from protection persons who are using drugs: "For purposes of this chapter, the term 'individual with a disability' does not include an individual who is currently

engaging in the illegal use of drugs[.]" *Id.* Section 12114. By placing drug users outside the ADA's protective ambit, Congress explicitly refused to open employment doors for them.

2. *state statutes*

Statutes enacted by Texas further define the dominant public policy favoring a drug-free society. For example, Texas Revised Civil Statutes Annotated article 8308-7.10(a)(West Supp. 1993), styled Policies for elimination of drugs in the workplace, mandates the following: "Each employer who has 15 or more employees and who maintains workers' compensation insurance coverage shall adopt a policy designed to

eliminate drug abuse and its effects in the workplace." Another statutory provision, which requires state agencies to report equal employment opportunity data concerning handicapped persons to the governor's office, specifically excludes from the definition of "handicapped person" anyone "who is addicted to the use of alcohol or to a drug or other controlled substance." TEX.REV.CIV.STAT.ANN. art. 6252-16b, Section 1 (West Supp. 1993). Likewise, the state's Commission on Human Rights Act, enacted "to secure for persons within the state freedom from discrimination in certain transactions concerning employment . . . [and] to preserve the public safety, health, and general

welfare," affirmatively states that "disability" does not include "a person with a current condition of addiction to the use of alcohol or any drug or illegal or federally controlled substance[.]" TEX.REV.CIV.STAT.ANN. art. 5221k, Sections 1.02(2) and 2.01(4)(A)(West Supp. 1993).

3. *various regulations*

Additionally, we refer to examples of the innumerable regulations from various governmental agencies concerning drug testing programs as further demonstrating our current national policy. The Department of Transportation has promulgated comprehensive regulations arguably applicable to

APPENDIX A

Wcods mandating anti-drug programs for workers stationed on petro-chemical pipelines. 49 C.F.R. Section 199 (1991). Many other regulations echo the concern. *See, e.g.,* Control of Alcohol and Drug Use, 49 C.F.R. Section 219 (1992)(Federal Railroad Administration); Federal Aviation Administration Drug Testing Program, 14 C.F.R. Section 121, Appendix I (1992); Fitness For Duty Programs, 10 C.F.R. Section 26 (1993)(Nuclear Regulatory Commission); Department of Defense Drug Abuse Testing Program, 32 C.F.R. Section 60 (1992); Procedures for Transportation Workplace Drug Testing Programs, 49 C.F.R. Section 40 (1992)(Department of

Transportation).

More generally, pursuant to a presidential initiative to establish drug-free workplaces, Executive Order No. 12564 (*reprinted in* 5 U.S.C. Section 7301 note) requires *every* federal executive agency to establish a random testing program for civilian employees who hold safety- and security-related positions.[8]

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[8] The Order, which forbids illegal drug use by federal employees both on and off duty, specifically recognized that,

> Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;
> * * * * * *

4. *judicial decisions*

An abundance of judicial decisions condemn the presence of drugs in the workplace. *Misco,* for example, although the Supreme Court took issue with the failure to formulate the invoked policy with precision, noted that our view that public policy condemns the operation of dangerous machinery by workers using drugs or alcohol "is firmly rooted in common sense." 484 U.S. at 44, 108

> The Federal government, as the largest employer in the nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace[.]

S.Ct. at 374; *see also, Oil Workers Loc. 4-228 v. Union Oil Co. of Cal.*, 818 F.2d 437, 442 (5th Cir. 1987)(recognizing this Circuit's strong public policy against the operation of dangerous machinery by persons using drugs or alcohol). Other jurisdictions are in accord. In a case involving a papermill worker who possessed marihuana on company premises, the First Circuit specifically "conclude[d] that there is a well-defined public policy against the use of drugs in the workplace." *S.D. Warren Company v. United Paper Workers Int'l Union,* 815 F.2d 178, 186 (1st Cir.)(*"Warren I"*), *vacated,* 484 U.S. 983, 108 S.Ct. 497, 98 L.Ed.2d 496 (1987), *on remand,* 845 F.2d 3 (1st

Cir.)(*"Warren II"), cert. denied,* 488 U.S. 992, 109 S.Ct. 555, 102 L.Ed.2d 582 (1988). In language pertinent to the case before us, the Court observed:

> There are laws against the sale and use of drugs enacted by all states, . . . and the sale and use of drugs is a serious offense under federal laws. [citations omitted]. Furthermore, the nation has focused on the corrosive consequences of drug sale and use and has devoted itself to their eradication. In particular, the work shop is a place where such usage is abominable not only because of the health hazard it creates, but also because it creates an unsafe atmosphere and is

deteriorative of production, the quality of the products, and competition.

815 F.2d at 186.[9]

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[9] Upon remand for further consideration in light of *Misco,* the First Circuit in *Warren II* did not affirm specifically the *Warren I* holding that vacated the arbitration award on public policy grounds. Instead, the Court chose not to revisit the public policy issue and "assume[d] without deciding" that *Misco* foreclosed the alternate public policy basis for its earlier decision. *Warren II*, 845 F.2d at 7. Instead, *Warren II* relied upon the arbitrator's usurpation of authority in ignoring the contract's plain language that granted management the sole right to discharge employees for cause and removed from the arbitrator the authority to fashion a remedy once certain rules were broken. It was careful, however, to highlight a post-*Misco* case from the Eighth Circuit which relied upon *Warren I* as a basis for refusing to enforce an arbitration award on public policy grounds. *See Iowa Elec.*, 834 F.2d at 1428.

APPENDIX A

As we have noted previously, petro-chemical refineries are dangerous places; there is no margin for error. *See Union Oil,* 818 F.2d at 439, 441 n. 3 (affirming the arbitrator's emphasis on "the danger inherent in the oil refinery work environment" where "fires and explosions often occur . . . with calamitous and costly results"). Woods's duties as a process technician at the refinery involved the potential handling of high-pressure and high-temperature liquids and gases. Such assignments have the capacity to place thousands of people, as well as the surrounding

environment, at risk.[10] As Arbitrator Grimes remarked in an arbitration involving a petro-chemical facility,

> [Refineries have] the responsibility to the community, its owners and its employees to provide a safe work environment. Given the nature of the products handled in a refinery, particularly those in operations where the most volatile and hence more explosive gases and fluids are produced, an accident which can result

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[10] The Baytown refinery operates in a community of over 60,000 residents. Moreover, according to Exxon, "the refinery sits on the banks of the Houston Ship Channel, an environmentally sensitive waterway that feeds into the Gulf of Mexico."

> from a seemingly insignificant misstep can produce a catastrophe.

Marathon Petroleum Co., 89 Lab.Arb. 716, 722 (1987).

Woods's position is rightly characterized as safety-sensitive. And federal courts have with some frequency overturned awards of reinstatement on public policy grounds where, as here, public safety was implicated. *See, e.g., Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983)(reversing an arbitrator's reinstatement of an over-the-road truck driver who drank liquor while on duty); *Iowa Elec.*, 834 F.2d at 1427-30 (refusing to reinstate a nuclear power plant employee who had compromised a

reactor safety system, despite the arbitrator's decision that discharge was too harsh a sanction); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 666-68 (11th Cir. 1988)(striking down an award that reinstated a pilot who flew while intoxicated), *cert. denied*, 493 U.S. 871, 110 S.Ct. 201, 107 L.Ed.2d 154 (1989); *Georgia Power Co. v. IBEW, Local 84*, 707 F.Supp. 531, 533-34 (N.D. Ga. 1989)(refusing to reinstate a power company employee who was a chronic drug user and who was responsible for monitoring various meters and gauges to ensure that high pressure equipment did not overheat), *aff'd*, 896 F.2d 507 (11th Cir. 1990).

APPENDIX A

The Supreme Court has approved of drug testing for employees in safety-sensitive jobs. *Skinner v. Railway Labor Executives Ass'n,* 489 U.S. 602, 621, 109 S.Ct. 1402, 1415, 103 L.Ed.2d 639 (1989)(noting that Government has a strong interest in preventing railroad personnel "from using alcohol or drugs while on duty, or while subject to being called for duty" so as to ensure the safety of the public and of the employees themselves); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 670, 109 S.Ct. 1384, 1393-94, 103 L.Ed.2d 685 (1989)(recognizing that Government's interest in guarding against on-the-job impairment justifies the imposition of suspicionless drug-testing of

certain customs agents).

[12] We hold that the above-cited authorities, viewed particularly in light of Woods's efforts to conceal his drug use, represent a valid expression of a "well defined and dominant" public policy. The delineation of public policy does not fall short by consisting only of "general considerations of supposed public interests."

To be sure, various courts have adhered to a narrow construction of the public policy exception and have refused to disturb an arbitrator's bargained-for judgment on public policy grounds. GCIWU relies primarily upon two decisions for its position that Woods's reinstatement does not breach public policy.

First, it cites *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, Int'l Ass'n of Machinists and Aerospace Workers,* 886 F.2d 1200, 1216-17 (9th Cir. 1989)(*en banc*), *cert. denied,* 495 U.S. 946, 110 S.Ct. 2205, 109 L.Ed.2d 531 (1990). In *Stead,* a plurality of the *en banc* Ninth Circuit found no dominant public policy barring the reinstatement of an auto mechanic who recklessly failed to tighten a car's lug bolts. Drug use was not involved in the case. In a severely split decision, the *Stead* plurality held that the materials relied upon by the original panel, California code provisions regarding auto safety and maintenance, were insufficient to form an explicit, well-defined, public

policy. Without expressly saying so, the plurality opinion also strongly suggests that unless the award itself constitutes a clear violation of positive law, courts are powerless to intervene - a question left purposely unresolved by the Supreme Court in *Misco,* 484 U.S. at 45, n. 12, 108 S.Ct. at 374-75, n. 12, and expressly rejected by this Court.

[13] Moreover, the plurality states a rule of construction that a grievant's "amenability to discipline" cannot be second-guessed by a reviewing court, whatever the policy issue at stake. *Stead,* 886 F.2d at 1213 (citing dicta from *Misco,* 484 U.S. at 44-45, 108 S.Ct. at 374). We reject such a restrictive test, which

would have the practical effect of ousting the courts of jurisdiction and abdicating the public policy question entirely to arbitrators. Under the plurality's problematic decision, if an arbitrator finds the discharged employee amenable to discipline and therefore unlikely to breach a properly-framed public policy in the future, such a determination would be unreviewable. Our reading of *Misco* does not compel such a "hands-off" policy. The plurality's rule of no judicial power to evaluate amenability does not comport with *W.R. Grace's* teaching, acknowledged in *Misco*, that "'the question of public policy is ultimately one for resolution by the courts.'" 484 U.S. at 43, 108 S.Ct. at 373 (quoting *W.R.*

Grace, 461 U.S. at 766, 103 S.Ct. at 2183). The valuable principle of deference to arbitration does not take us so far.

Second, the Union cites *Northwest Airlines v. Air Line Pilots Ass'n, Int'l,* 808 F.2d 76 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1014, 108 S.Ct. 1751, 100 L.Ed.2d 213 (1988), in which the D.C. Circuit ordered the reinstatement of a commercial airline pilot who had admitted to flying his plane while intoxicated. But *Northwest Airlines* includes a unique factual distinction. In that case, the Federal Aviation Administration ("FAA") had recertified the pilot after he had completed an alcohol rehabilitation program. FAA recertification, a

condition the arbitrator made integral to his reinstatement award, embodied a specific determination by the regulator itself that the pilot was "fit and qualified to fly." 808 F.2d at 83. A court would certainly be hard-pressed to oppose reinstatement where the regulatory body charged with ensuring workplace safety agrees to it. That did not happen in the instant case. Arbitrator Helburn did not condition his reinstatement of Woods upon a specific determination by a governmental body that Woods was fit to resume his duties at the refinery.

This is not just the usual case of an arbitrator's reinstatement of a errant employee. We view as of the utmost importance in this case that fact that Woods

tested positive for a drug as critical and powerful as cocaine when he had already been through rehabilitation and was in a sense on probation. Then, he did not notify anyone of his relapse as required, and only later did he admit his serious breach when confronted with the test results. A conclusion requiring "another chance" and further rehabilitation is on its face extremely risky under these unusual and uncommon circumstances. As Arbitrator Helburn himself recognized, "Discharge is appropriate where the employer can demonstrate the previous use of progressive/corrective discipline to no avail." The reinstatement of such a worker is not compelled by

Misco, and we find no judicial decision requiring upholding an arbitrator's awarding of reinstatement to such an employee.

The record does not show that Woods was impaired while on duty or that he used cocaine on Exxon's premises. This circumstance, however, does not control in the light of Woods's sensitive position and his attempts to conceal his drug use. Woods's duplicity in hiding his violation of the after-care agreement obviously increases the risk of future violations. Also, the arbitrator ordered Woods to be restore to his previous safety-sensitive position. Exxon was not allowed to consider placing him in a less dangerous

assignment. In *Misco*, the Supreme Court made reference to the provision of the award that permitted the company to transfer the grievant to a different equivalent job, remarking that it was unclear that the worker "would pose a serious threat to [himself and others] in every job for which he was qualified." 484 U.S. at 45, 108 S.Ct. at 374. In the case before us, no such discretion exists; Woods was ordered to be returned to his former position as a process technician.[11]

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[11] Other courts have noted that companies could face extraordinary liability if, despite proven instances of deception regarding the company's drug policy, they nevertheless restored violators to their sensitive

APPENDIX A

As stated above, courts are the ultimate arbiters of public policy in the arbitration context. This case presents us with public policy favoring a safe and drug-free workplace as expressed in countless governmental directives and judicial decisions. Mr. Woods was an employee who tested positive for cocaine while on the job, who had already taken advantage of his company's rehabilitation-focused treatment program only to breach

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positions. *See, e.g., Georgia Power*, 707 F.Supp. at 536 n. 4, 538 (remarking that reinstatement could potentially expose the employer to liability for damages caused by a worker's future drug use). *See also, e.g., Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977)(stating that employers are liable for those hazards caused by their employees if the dangers were foreseeable and preventable).

the after-care contract on two occasions (excusing his failure to report the relapse only because he felt "too embarrassed" by it), and who had refused to admit his drug use until the test results later came back positive. We conclude that compelled continued employment of Woods in a safety-sensitive position is sufficient to represent a plain violation of "well defined and dominant" public policy. The summary judgment in favor of Exxon is properly supported on this basis.

B. Consideration of Post-Discharge Conduct[12]

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[12] GCIWU argues that Exxon has waived its objection to the arbitrator's consideration of Woods's post-discharge conduct by not lodging a proper objection either at the grievance hearing or in its post-

[14] As an alternative basis for vacating the arbitrator's award, Exxon also contends that the arbitrator below improperly considered "post-discharge good works" as a basis for reinstating Woods. As a result, argues Exxon, the arbitrator exceeded the scope of his authority under the contract. Specifically, the arbitrator considered and relied upon several assertions regarding Woods's post-discharge behavior, including (1) his post-relapse drug and alcohol abstinence, (2) his

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hearing brief. But given that arbitrators typically receive evidence liberally and do not feel constrained by strict applications of the rules of evidence, Exxon is not precluded from arguing this point on appeal in a *de novo* review.

ability to hold a job, (3) his realization that he must live "one day at a time." In sum, the arbitrator considered these factors in making his just cause determination and in concluding that Woods represented "a good bet for successful rehabilitation so that discharge is not justified at this point in his treatment." For its part, the Union urges strenuously that an arbitrator may properly condition his just cause determination on numerous factors, even those that arise after termination.

In considering this issue, we are guided by our prior recognition that, to "draw its essence" from the contract, "an [arbitrator's] award must have a basis that is at least rationally inferable, if not obviously drawn,

from the letter or purpose of the collective bargaining agreement . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract[.]" *Loc. U. 59, Int. Bro. of Elec. Wkrs. v. Green Corp.*, 725 F.2d 264, 268 (5th Cir.)(citation omitted), *cert. denied*, 469 U.S. 833, 105 S.Ct. 124, 83 L.Ed.2d 66 (1984).

The inquiry is straightforward: should the arbitrator have relied upon evidence of events that occurred after Woods's discharge? Once again, the Supreme Court's decision in *Misco* provides important guidance. In *Misco*, the arbitrator *refused* to consider evidence unknown to the company at the time the

grievant was fired. The Court noted that the arbitrator's refusal was merely a construction of what the agreement required when deciding discharge cases: "an arbitrator was to look only at the evidence before the employer at the time of discharge. As the arbitrator noted, this approach was consistent with the practice followed by other arbitrators." 484 U.S. at 39-40, 108 S.Ct. at 371. The Court elaborated in an accompanying footnote:

> Labor arbitrators have stated that the correctness of a discharge "must stand or fall upon the reason given at the time of discharge," *see, e.g., West Va. Pulp & Paper Co.*, 10

> Lab.Arb. 117, 118 (1947), and arbitrators often, but not always, confine their considerations to the facts known to the employer at the time of discharge. O. Fairweather, Practice and Procedure in Labor Arbitration 303-306 (2d ed. 1983); F. Elkouri & E. Elkouri, How Arbitration Works 634-635 (3rd ed. 1973).

484 U.S. at 40 n. 8, 108 S.Ct. at 371-72 n. 8.

In the instant case, Article Twenty-Six of the applicable collective bargaining agreement provides that Exxon "shall have the right to discipline and discharge employees for just cause." Arbitrator Helburn was presented with this stipulated issue: "Was Thomas W.

Woods discharged for just cause and, if not, what is the appropriate remedy?" The first part of the question is worded in the past tense. It is equivalent to asking, "Did Exxon possess just cause on June 15, 1990 to terminate Thomas W. Woods?" Upon a careful review of the applicable legal principles and the terms of the parties' collective bargaining agreement, which strips the arbitrator of authority "to alter or add to it in any way," we hold that the arbitrator should have confined his considerations only to the facts as they existed at the time Exxon made its termination decision.

This decision is supported by most of the caselaw. As noted above, the *Misco* Court recently

affirmed an arbitrator's refusal to consider evidence not relied upon by the company at the time of discharge. 484 U.S. at 39-40, 108 S.Ct. at 371. The Eleventh Circuit is in accord. In *Delta Airlines*, which concerned a pilot terminated for flying while intoxicated, the court held that one basis for its reversal of the arbitration board's reinstatement award was the board's improper consideration of the grievant's post-discharge conduct. Specifically, the Arbitration Board, while finding that the pilot "did commit a dischargeable offense," nonetheless found an absence of just cause for the termination in part because, "after discharge and after rejection of his grievance," the alcoholic pilot had sought rehabilitation.

861 F.2d at 668, 669. For guidance, the Court turned to one of its previous decisions, *Butterkrust Bakeries v. Bakery, Conf. & Tobacco Wkrs.*, 726 F.2d 698 (11th Cir. 1984), and reasoned:

> *Butterkrust* holds that an arbitrator is bound to decide just cause for discharge, *vel non,* at the time of discharge. The arbitrator's responsibility is discharged upon his determination of the existence of just cause. If this finding has been made, *the arbitrator is not authorized to employ "his own brand of industrial justice" and decide what post discharge good works would entitle the properly discharged employee to rehire.* While

> the arbitrator . . . may be an actual or potentially excellent personnel expert, his opinion as to what employment opportunities one ought to have if he or she, after discharge, constructively addresses the problems that lead to discharge is not pertinent to the arbitration duties. The arbitrator's effort to impose his views on that subject upon the parties to the arbitration amounts to his basing his decision upon "his own brand of industrial justice." which is forbidden.

Delta Airlines, 861 F.2d at 669 (emphasis added).

Mobil Oil Corp. v. Independent Oil Workers Union, 679 F.2d 299 (3rd Cir. 1982), points to an

important application of the basic principle. *Mobil* concerned a mentally disturbed grievant who was terminated because he fought on the job and had a poor work record. At the time Mobil discharged the worker, it was unaware of his mental disorder. The arbitrator nevertheless concluded that "cause" should be construed objectively and not governed by the subjective standard of what Mobil actually knew when it fired the employee. The arbitrator considered an array of information, including medical and other evidence, that came to light after the discharge. The Court upheld consideration of this evidence by the arbitrator although it was not within Mobil's knowledge on the date the

grievant was fired. The Court, however, properly stressed its continued adherence to the rule that "an arbitrator may not rely on an employee's subsequent rehabilitation to order reinstatement." *Id.* at 303 (citing *American Honda Motor Co. v. Local 585, UAW*, No. 79-1231, (E.D. Pa. July 20, 1979), *aff'd mem.*, 615 F.2d 1352 (3rd Cir. 1980)). The established rule was not violated because the arbitrator considered only later-discovered evidence which established the situation at the time of discharge, not evidence of later changes in the situation.

In the instant case, instead, the arbitrator relied heavily upon circumstances regarding Woods's post-

discharge rehabilitation efforts. Such reliance was a departure from his authority under the contract. The Union looks principally to a Ninth Circuit decision for the proposition that an arbitrator can properly consider post-discharge conduct in reaching his decision. *See Intern. Ass'n of Machinists v. San Diego Marine*, 620 F.2d 736 (9th Cir. 1980). But that case actually favors Exxon's position. In *San Diego Marine*, the company argued that a reinstatement award should be vacated because the arbitrator considered evidence regarding the company's improper behavior at a post-termination grievance meeting. On appeal, the Ninth Circuit refused to disturb the arbitrator's reinstatement award because "[u]nlike

the arbitrator in [*Delta Lines, Inc. v. Teamsters Local 468*,66 Cal.App.3d 960, 136 Cal.Rptr. 345 (1977)] . . . this arbitrator did not state that he was reaching his decision *because* of post-termination conduct of the Company. Rather, the arbitrator seems to have reached his conclusion in light of all of the circumstances surrounding the discharge." *Id.* at 739 (emphasis added). The arbitrator's decision was upheld because it was not *based* upon the company's post-termination conduct.

Although we are mindful of the Supreme Court's time-honored admonition that merely an "*inference* that the arbitrator may have exceeded his authority, is not a

reason for refusing to enforce the award," *Steelworkers v. Enterprise Wheel & Car, Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960)(emphasis added), the arbitrator's decision in this case goes beyond mere surmise or intimation. He did properly consider Woods's long-time record with Exxon as a basis for reinstatement. His principal basis for believing Woods would benefit from a lesser sanction, however, was stated this way: "I am impressed that he testified honestly and *since his relapse* he seemingly has learned better how to deal with his environment. He has attended AA meetings, held a job and learned to live 'one day at a time,' which he must do if he is to control

his dependancy [sic]." (emphasis added). Such heavy reliance upon Woods's post-relapse behavior defeats the normal presumption urging us to uphold an award when its underlying reasoning is merely ambiguous. 363 U.S. at 598, 80 S.Ct. at 1361.

Accordingly, we conclude that the arbitrator's award must be vacated also on this alternative ground.

CONCLUSION

On the facts before us, we conclude that reinstatement of a worker to his safety-sensitive position after having breached his after-care agreement would eviscerate the "well defined and dominant" public policy underlying our nation's efforts to promote a workplace

free of drugs and alcohol. This is particularly true concerning industries that, like petro-chemical refineries, have the capacity to impact public safety. Moreover, the arbitrator erred in basing his decision upon several conclusions concerning Woods's post-termination conduct. In exercising such reliance, Arbitrator Helburn exceeded his proper, contracted-for authority.

The arbitrator's award reinstating Thomas Woods was properly set aside.

AFFIRMED.

APPENDIX B

AGREEMENT

between

Exxon Company, U.S.A.
Refining Department
Baytown Refinery

and

Gulf Coast
Industrial Workers Union

Effective April 15, 1987

APPENDIX B

COLLECTIVE BARGAINING AGREEMENT

STATE OF TEXAS
COUNTY OF HARRIS

THIS AGREEMENT is entered into by the following parties: Exxon Company, U.S.A. (a division of Exxon Corporation), hereinafter referred to as "Exxon U.S.A." or "Company," and Gulf Coast Industrial Workers Union, hereinafter referred to as "Union."

WITNESSETH:

WHEREAS, subsequent to an election conducted by the National Labor Relations Board in Case No. 23-RC-2088, the Board issued a Certification of Representative dated July 18, 1963, in which it certified

the Union as the bargaining representative for a Unit of Production and Maintenance employees as described in the Stipulation for Certification upon Consent Election entered into in said case on July 9 and 10, 1963, reference being made to said Certification and Stipulation for all purposes; and

WHEREAS, pursuant to said Certification, Humble Oil & Refining Company recognized the Gulf Coast Industrial Workers Union as the exclusive bargaining representative of all employees at its Baytown Refinery in the Production and Maintenance Unit referred to above; and

WHEREAS, on June 1, 1966, Humble sold its

APPENDIX B

Chemical Plant facilities located at its Baytown Refinery (known as the Baytown Chemical Plant) to Enjay Chemical Company and Enjay hired certain employees in the Production and Maintenance Unit who had been employed at such Baytown facilities by Humble prior to June 1, 1966: and

WHEREAS, on June 1, 1966, by agreement of Humble, Enjay, and the Union, a multiemployer bargaining unit was established; and

WHEREAS, on January 1, 1973, Humble Oil & Refining Company and Enjay Chemical Company merged into their parent Exxon Corporation and, at the same time, Humble became Exxon Company, U.S.A. (a

division of Exxon Corporation) and Enjay became Exxon Chemical Company U.S.A. (an operating division of Exxon Chemical Company, a division of Exxon Corporation); and

WHEREAS, on May 8, 1980, Exxon, U.S.A., Exxon Chemical Americas (formerly Exxon Chemical, U.S.A.), and the Union agreed to discontinue the multiemployer bargaining unit and agreed to separate contracts;

WHEREAS, the Company and the Union desire to enter into an agreement for the purpose of collective bargaining concerning rates of pay, wages, hours of work, and other conditions of employment for the

employees in the referred-to unit;

NOW, THEREFORE, it is agreed by and between the parties as follows:

Article One

COVERAGE

A. Exxon, U.S.A. recognizes the Union as the exclusive representative of its Production and Maintenance employees employed at its Baytown Refinery facilities for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

B. Where the context and the circumstances require, the gender of all words used in this document

shall include the masculine, feminine, and neuter; and the singular of all words shall include the plural and the plural, the singular.

Article Two

UNION AND COMPANY REPRESENTATIVES

A. The Company and the Union will at all times refrain from interfering in each other's choice of official representatives.

B. Upon certification by the Union to the Company that it has an official representative or representatives to represent the employees for the purpose of dealing with the Company on grievances, the Company will

recognize and deal with such representative or representatives on such matters, subject to the provisions of this Agreement.

Article Three

Duration of Contract

A. This Agreement shall be effective April 15, 1987 and remain in force and effect through April 15, 1989 and for consecutive two-year periods thereafter unless terminated by either party by giving written notice not less than 60 nor more than 90 days in advance of termination of contract.

B. The presentation of any proposal to change this Agreement will not forestall or in anywise prevent the

automatic renewal of this Agreement. This is true irrespective of the scope of the proposal or the time it is presented.

C. By mutual agreement, the parties may amend this Agreement at any time. For any Amendment to become effective, it must be signed by the President and Secretary of the Union and by an authorized representative of the Company.

Article Four

FUNCTIONS OF MANAGEMENT

The Company shall retain all rights of management resulting from the ownership of its plant and facilities or pertaining to the operation of the

business, except to the extent that such rights are limited by the provisions of this Agreement.

* * * * *

Article Fourteen

GRIEVANCE AND

GRIEVANCE PROCEDURE

A. A grievance is the situation which exists when an employee, a group of employees, or the Union feels injured, treated unfairly, or aggrieved because of the position taken by the Company or any member of management, in regard to a matter concerning wages, hours, working conditions, or any part of this Contract. The appropriate steward, upon notification of a

grievance by an aggrieved employee or employees, shall have the right, with permission from the Steward's immediate supervisor, to investigate any conditions said by the aggrieved to have caused the grievance. In the event a grievance comes to the attention of the Union and the employee(s) affected elects not to pursue the matter, the appropriate Steward may process it in accordance with the regular procedure. All grievances that the Union may elect to process shall be in accordance with the following procedures:

B. Grievance Procedure

1. First Step

The aggrieved and/or the appropriate Steward

may discuss the situation with the aggrieved's immediate supervisor provided the grievance is submitted within 30 calendar days from the date of the occurrence.

2. Second Step

If the immediate supervisor does not hear the grievance within one day after the request for a conference has been made, or satisfy it within four days after the conference ends, the employee and/or the Union Steward or Stewards may present the grievance within 15 days to the appropriate Department Head and then confer with the Department Head or his designated representative.

3. Third Step

If the appropriate Department Head, or his designated representative, does not hear the grievance within five days after the request for a conference has been made or satisfy it within five days after the conference ends, the employee and/or the Union may present the grievance within 20 days to the Refinery Manager.

4. Fourth Step

If the Refinery Manager, or his designated representative, does not arrange such a conference within ten days after the request is presented, or if the grievance is not satisfied within ten days after the

conference ends, the Union may if the grievance is arbitrable, that is, if it involves an alleged violation of a provision of this Agreement, proceed to the arbitration procedure.

C. 1. In computing the number of days to arrange a conference, or to satisfy a grievance, under this section, Saturdays, Sundays, and holidays shall not be counted.

2. The appropriate Stewards involved may be present at all conferences and must be present after the first step. The Union may designate an individual who is not the appropriate Steward in the event the appropriate Steward cannot be present. The Union

Business Agent may be present at any step in the grievance procedure except the first step.

3. At the second step there may be as many as three Union Stewards, besides the grievant, at any conference where a grievance is heard or presented. This number may be increased to as many as five at the third step.

4. The Company's answer beginning with the Department Head level shall be in writing.

5. If the Company and the employee adjust a grievance, then

a. The adjustment must be consistent with this Agreement, and

b. The Union Steward must be given an opportunity to be present at the adjustment of an alleged violation of the contract.

c. By mutual consent of the parties, a written answer by the Company may be waived.

Article Fifteen

ARBITRATION

If the grievance is not adjusted under the steps provided in Article Fourteen, and if it involves an alleged violation of a provision of this Agreement, then upon written demand by the Union the dispute may be referred within 30 days following the decision of the Manager, or his designated representative, to the

arbitration procedure. Upon receipt of a written demand for arbitration, the Company and the Union shall meet to reduce to writing the question to be submitted to the Arbitrator. In the event the Union and the Company fail to agree upon the question to be submitted prior to the convening of the arbitration hearing, the Arbitrator shall decide the question at the beginning of the hearing.

The Company and the Union shall each select one representative. These representatives shall make a joint request to the Federal Mediation and Conciliation Service to name a panel of five qualified arbitrators. The representatives shall select the Arbitrator from this panel by alternately striking names until four have been

stricken. A toss of the coin shall determine whether the Union or the Company shall strike the first name. the remaining member of the panel shall be the Arbitrator. No one can be an arbitrator in more than one grievance between the parties during any 12-month period.

The Arbitrator shall have the authority only to interpret and apply the provisions of this Agreement and shall not have the authority to alter or add to it in any way. The decision of the arbitrator shall be final and binding on the Company and the Union for the duration of this agreement.

The Company shall not be obligated to pay any employee for work time lost in attending an arbitration

hearing. The fees and expenses of the Arbitrator shall be borne equally by the parties.

In cases involving termination of employment, the parties shall:

* Meet within ten working days following appeal to arbitration to reduce to writing the question to be submitted to the arbitrator.

* Request a panel of arbitrators within five working days after reducing the question to writing.

* Select the arbitrator within ten working days following receipt of the panel of arbitrators.

* Establish a date for the hearing within 15 working days following notification by the arbitrator. The hearing

shall be scheduled within 90 calendar days.

* Request that the arbitrator render an answer within 60 calendar days of the close of the hearing.

* * * * *

Article Twenty-Six

DISCIPLINE AND DISCHARGE

A. The first year of continuous active service by an employee shall be considered as temporary, and termination of employment within that time may be made at the discretion of the Company.

B. The Company shall have the right to discipline and discharge employees for just cause. The commission of the offenses in Schedule C shall be just cause to render

an employee liable to discharge on first offense. In the event of discharge, the Company will give the employee and, at his request, the Union a written statement giving the reason or reasons for the discharge.

* * * * * *

AMENDATORY AGREEMENT

STATE OF TEXAS

COUNTY OF HARRIS

Consistent with the agreements reached in recent negotiations, Exxon Company, U.S.A. ("Company") and the Gulf Coast Industrial Workers Union ("Union") have agreed that the collective bargaining Agreement between the parties of April 15, 1987 shall be amended

as set forth below. All terms and conditions of the Agreement are subject to conformance with applicable Federal laws, regulations, and standards.

Amend Article Three, DURATION OF CONTRACT, Section A., to read as follows:

"A. This Agreement shall be effective April 15, 1989 and remain in force and effect through April 15, 1991 and for consecutive two-year periods thereafter unless terminated by either party by giving written notice not less than 60 days nor more than 90 days in advance of termination of contract."

APPENDIX B

Amend Article Fourteen, GRIEVANCE AND GRIEVANCE PROCEDURE, Section B.2., to read as follows:

"2. Second Step

"If the immediate supervisor does not satisfy the grievancwe within five days after the request for a conference has been made, the employee and/or the Union Steward or Stewards may present the grievance within 15 days to the appropriate Department Head and then confer with the appropriate Department Head or his designated representative."

APPENDIX B

Amend Article Fifteen, ARBITRATION, to read as follows:

Article Fifteen

Arbitration

"If the grievance is not adjusted under the steps provided in Article Fourteen, and if it involves an alleged violation of a provision of this Agreement, then upon written demand by the Union the dispute may be referred within 30 days following the decision of the Manager, or his designated representative, to the arbitration procedure. Upon receipt of a written demand for arbitration, the Company and Union shall meet to reduce to writing the question to be submitted to the

Arbitrator. In the event the Union and Company fail to agree upon the question to be submitted prior to the convening of the arbitration hearing, the Arbitrator shall decide the question at the beginning of the hearing.

"The Company and the Union shall each select one representative. These representatives shall make a joint request to the Federal Mediation and Conciliation Service to name a panel of five qualified arbitrators. The representatives shall select the Arbitrator from this panel by alternately striking names until four have been stricken. A toss of the coin shall determine whether the Union or the Company shall strike the first name. The remaining member of the panel shall be the Arbitrator.

APPENDIX B

No on can be an arbitrator in more than one grievance between the parties during any six-month period. The six-month period shall begin on the first day of a hearing. An arbitrator must be selected and a hearing scheduled within 12 months of the day a grievance is appealed to arbitration.

"The Arbitrator shall have the authority only to interpret and apply the provisions of this Agreement and shall not have authority to alter or add to it in any way. The decision of the arbitrator shall be final and binding on the Company and the Union for the duration of this agreement.

"The Company shall not be obligated to pay any

employee for work time lost in attending an arbitration hearing. The fees and expenses of the Arbitrator shall be borne equally by the parties.

"In cases involving termination of employment, the parties shall:

"* Meet within ten working days following appeal to arbitration to reduce to writing the question to be submitted to the arbitrator.

"* Request a panel of arbitrators within five working days after reducing the question to writing.

"* Select the arbitrator within ten working

days following receipt of the panel of arbitrators.

"* Establish a date for the hearing within 15 working days following notification by the arbitrator. The hearing shall be scheduled within 90 calendar days.

"* Request that the arbitrator render an answer within 60 calendar days of the close of the hearing."

* * * * * *

Except as amended, the collective bargaining Agreement between the parties shall remain in full force and effect.

APPENDIX B

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their duly authorized officers this the 19th day of May, 1989.

EXXON COMPANY, U.S.A.

By _____
/s/ S. J. Glass, Jr., Manager
Baytown Refinery

GULF COAST INDUSTRIAL
WORKERS UNION

By _____
/s/ R. L. Lucas, President

By _____
/s/ G. V. McGrew, Secretary

APPENDIX C

In the Matter of
the Arbitration

between

EXXON COMPANY,
U.S.A.
Baytown, Texas
-and-

GULF COAST
INDUSTRIAL
WORKERS UNION

OPINION AND AWARD

OF THE

ARBITRATOR

I. B. Helburn

FMCS No. 91-11050

Thomas Woods Discharge

APPEARANCES

For the Company:

William J. Davis; Senior Counsel

For the Union:

APPENDIX C

Sharon Groth;	Attorney
Thomas W. Woods;	Grievant
William Carlisle;	Process Technician
Gene Degner, M.D.;	Director, Drug & Alcohol Rehabilitation Inst.

BACKGROUND

Most of the facts in this case have been stipulated to by Exxon Company, U.S.A. (Company) and the Gulf Coast Industrial Workers Union (Union).[1] The

[1] Unless otherwise noted, this section is taken from the parties' stipulations, which were entered into the record as Joint Exhibit (JX) 2.

parties have entered into a collective bargaining Agreement, effective April 15, 1987. Article 26, Section B of that Agreement states:

> The Company shall have the right to discipline and discharge employees for just cause. The commission of the offenses listed in Schedule C shall be just cause to render an employee liable for discharge on first offense. In the event of discharge, the Company will give the employee and, at his request, the Union a written statement giving the reason or reasons for the discharge. (JX-1).

The grievant, Thomas Woods, was employed at

the Baytown Refinery as a Process Technician on April 8, 1974. In January 1987 he was suspended for 10 days for excessive tardiness. In March 1989 he received a written warning for excessive tardiness and unexcused absence. In April 1989 Woods received a two-day suspension for being late to work. He testified that all discipline was primarily the result of his alcoholism. On February 5, 1990, in an administrative action, Woods was placed on the Medical Certification List because of absences due to disability.

In January 1988 the Company sent all employees of the Baytown Refinery a set of "Alcohol and Controlled

Substance Guidelines" which "absolutely prohibited" . . . "the use, possession, distribution, sale, or being under the influence of alcohol or controlled substances on the premises . . ." with same to be "cause for termination of employment" (JX-2, Ex. 7). On January 17, 1990 the Company sent represented employees a copy of the revised Alcohol and Drug Use Policy, effective January 31. The policy included unannounced, periodic random drug and alcohol testing for five years thereafter for employees who participated in aftercare programs. The aftercare programs, required for employees who disclosed that they had been through a substance

abuse rehabilitation program, were new with the policy and were explained in an attached pamphlet.

Woods testified that in March 1990 he entered an in-patient treatment program for alcoholism. Prior to April 17, 1990 he disclosed his participation in this program at San Jacinto Hospital to Supervisor Janet Derauf. On or about April 17, Woods participated in a back-to-work conference with Dr. Steven Lerman, Derauf, first-line supervisor Joel Coy, Union Vice President Larry Howell and representatives of the aftercare program, administered by Human Affairs International (HAI). During the meeting Woods signed

APPENDIX C

an HAI Extended Aftercare Contract and an After-Care Plan Agreement with the Company. The Agreement which Woods signed included the following language:

> I have read Exxon's Alcohol and Drug Use Policy. The policy requires me to submit to periodic alcohol and drug testing at the Company's request. I understand that I will be subject to periodic and unannounced alcohol and drug testing for a period of 60 months . . . I understand that a positive alcohol or drug test result or refusal to submit to periodic testing is grounds for discipline as referenced in Exxon's

APPENDIX C

Alcohol and Drug Use Policy (JX-2, Ex. X).

The policy effective January 31 stated the "use . . . of illicit or unprescribed controlled drugs . . . is strictly prohibited and is grounds for termination" (JX-2, Ex. 8).

Woods returned to work on or about April 17. A random drug/alcohol screen (urinalysis) conducted on May 22, 1990 was negative. A random drug/alcohol screen (urinalysis) conducted on June 5, 1990 was positive for cocaine. The parties do not dispute the testing process used, the chain of custody or the positive findings, noting that the findings do not indicate the degree of impairment, if any, the amount of the drug

used or the time when the drug was used.

Woods testified that while he had experienced drugs as a teenager and had used drugs a few times while at Exxon, only alcohol became a problem. He had been clean and sober for over three months and had been attending daily Alcoholics Anonymous meetings – over 90 in 90 days. He believes that he was under extensive pressure, in part because of his upcoming marriage. Late on a Saturday afternoon an acquaintance stopped by his house when Woods was feeling blue and he allowed himself to be talked into using cocaine. He did not call his supervisor, counselor

or the back-up before using drugs or after, as he had been instructed.

Woods was scheduled for overtime the following Monday, but he called and refused it. He went to work on Tuesday and was tested that day. He worked until Friday, when he was told of the positive finding. The parties stipulated that the positive finding was reported to the Company on June 8. At a June 14 meeting which included Woods, Derauf, Coy and Union President Ken Evans, the grievant admitted using cocaine on Saturday, June 2 and early in the morning of June 3. On June 15, Woods was terminated effective that day, "as a result of

your violation of the Alcohol and Drug Use Policy" (JX-2, Ex. 12).

The discharge was grieved in writing that day, heard by the Plant Manager on June 25, after the first two steps of the grievance procedure had been waived, and denied on July 18, 1990. The grievance was appealed to arbitration on July 24, with the undersigned selected as arbitrator from a Federal Mediation and Conciliation Service panel. The grievance was heard in Baytown, Texas on July 12, 1990 (sic). The parties stipulated that the grievance was properly before the arbitrator. Management relied on the stipulations

presented by the parties and presented no witnesses. Those who testified for the Union, including the grievant, were affirmed before testifying and made available for cross-examination. The Union brief was received on August 16. The Company brief was received on August 19, 1991, the day on which the record was closed.

ISSUE

The stipulated issue is:

Was Thomas W. Woods discharged for just cause and, if not, what is the appropriate remedy?

APPENDIX C

COMPANY POSITION

The discharge was for just cause for reasons summarized below.

1. The case must be viewed in the context of the ever-increasing nationwide battle against the drug problem, the requirements on the Company to follow controlled substance regulations of the Department of Transportation, the Texas Department of Public Safety and the Texas Railroad Commission and the nature of the hazardous work performed in refineries, as noted by Arbitrator Grimes in Marathon Petroleum Co., 89 LA 716, 722 (1987).

2. In 1983 the Company provided alcohol and drug awareness counseling to employees and confidential assistance and counseling in securing treatment for alcohol and/or drug abuse. The 1988 Guidelines added testing for cause, re-emphasized medical treatment available for those with problems and made clear that a request of help or involvement in rehabilitation would not jeopardize employment. The revised Policy effective January 31, 1990 added the after-care program requirement following rehabilitation. That includes unannounced, random drug testing for five years, with a positive finding grounds for discipline,

including termination. After-care, underwritten by the Company, involves treatment programs tailored to each individual employee.

3. Following rehabilitation, Woods entered into an after-care program and acknowledged his responsibility to follow prescribed counseling and continuing care programs. Also, he acknowledged that he read and understood the Company policy, including random drug testing and the consequences of a positive finding. Woods knew the rules and the results of breaking them.

4. He violated the rules by failing to fulfill the first

condition of his after-care contract, which was to maintain total abstinence from drugs and alcohol. When stress endangered his sobriety, he neglected to call his counselor or supervisor, as he had committed to do. After his relapse, he did not inform his counselor, as he also was committed to do. Rather, he dishonestly concealed his cocaine use until confronted with the findings of the drug screen.

5. The Company's carefully drafted and thought-out after-care program evidences a serious commitment to rehabilitating dependent employees. The program has commitments from the Company, HAI, and

particularly the affected employee. The program recognizes that relapses occur, and instructs the employee what to do in such cases. If followed , the instructions lead to a second chance. If not, the employee may be terminated. The Union's witness testified that the employee should " 'stick to his contract to the letter' " and that serious consequences should follow if the contract is broken (Brief, p. 12). Woods broke his contract.

6. In a recent case (FMCS #91-07507) involving Exxon Chemical Americas and the Union, Arbitrator Samuel J. Nicholas, Jr. upheld the discharge of an

employee who had tested positive for cocaine while in an after-care program. The case is very similar to the instant case.

UNION POSITION

The Union believes that the discharge was not for just cause and that Woods should be reinstated with full back pay and allowances, plus interest. Reasons therefore are summarized below.

1. The grievant has not used drugs or alcohol since the discharge, holds a responsible job and is now subject to random drug testing and has learned how to stay committed to his treatment. After using cocaine,

Woods responsibly called the Company and refused an overtime opportunity. He then worked the rest of the week without showing signs of impairment. He admitted the mistakes of using drugs and of not telling his supervisor or counselor of his relapse, fearing discipline, but testified that he would have eventually confessed as this was something that he needed to face up to. Woods further noted that he had been a good employee for many years, had made a mistake, but had learned and become better for it. He has not denied his problem.

2. The arbitrator should consider Woods' long

service, mostly problem-free, and his obvious commitment to rehabilitation. In Westinghouse Electric Corp., 95 LA 881 (Arb. Talarico, 1990), a 24-year employee servicing customers in nuclear and fossil fuel plants developed a cocaine addiction. After rehabilitation he further used cocaine after being given narcotic drugs following dental surgery. Termination followed his failure to report for several days. The arbitrator reinstated the grievant due to his long, productive work history, his completion of an in-patient rehabilitation program, passage of four random drug screens and attendance at AA and NA meetings. The

case is similar to the instant case, wherein Woods has shown commitment to his recovery.

3. The Company has made a commitment to battling alcohol and drug abuse, as evidenced by the various policies and guidelines. The focus is on treatment and rehabilitation. Policies are written to provide for termination only as a final option after other forms of discipline do not work. The policy does not constitute a last chance agreement. Arbitrator George Roumel, in City of Pontiac, 97 LA 780 (1989), wrote that last chance agreements do not eliminate just cause as the relevant standard. The Pontiac last chance

agreement was similar to that in the instant case except that it precluded a range of punishment.

4. Arbitrator Nicholas' award involved a different company, bargaining unit and Agreement. Also, that grievant was discharged for a relapse following treatment for cocaine addiction. He would not admit his recent cocaine use despite the positive drug screen. Arbitrator Nicholas did not find the grievant credible. The case is unlike the instant case, where Woods admitted his mistake and has learned from it.

5. Dr. Degner, an expert in the practice of addictive medicine, testified that relapses will occur

during the rehabilitation process but that relapses do not invalidate prior treatment and can be a therapeutic part of the process and a learning experience for the patient. One relapse does not mean that an individual will not be able to control dependency (sic), particularly when the problem is admitted. Employment is an important aspect of the rehabilitation process; a punitive approach will be disfunctional (sic). Much of Dr. Degner's testimony is consistent with material in Dennenberg and Dennenberg, Alcohol and Drugs: Issues in the Workplace, BNA, 1983.

6. Woods had no performance problems after

rehabilitation. Bill Carlisle testified that Woods was a good employee, whom he would work with again. Woods has tried to save his job, but had one relapse, for which he was terminated. The discipline was overly harsh and not for just cause, and sends the wrong signal to the work force.

DISCUSSION

This case does not involve a question of the accuracy of the allegations. Woods, by his own admission and the unchallenged drug screen results, is guilty of failing to remain drug and alcohol free as required by the Company's "Alcohol and Drug Use

Policy" and the After-Care Plan Agreement that he signed and which he acknowledged that he understood. His relapse may have been the consequence of a failure to follow the commitment in the after-care contract to inform his HAI counselor and/or his supervisor if stress was endangering his sobriety. Even if that was not the case, Woods clearly ignored the commitment to inform his HAI aftercare clinician and/or his supervisor immediately after his relapse.

There can be no question that the Company had just cause to discipline Woods. But, this is not a case where discharge should automatically follow the

infraction, or if it does, where the discharge must be upheld by the arbitrator.

Discharge is appropriately upheld where the allegation is proven and the labor agreement removes from the arbitrator the discretion to assess the appropriateness of the discipline. Summary discharge is appropriate for some infractions which, by their nature, make continued employment a greater risk than the employer should be asked to bear. Theft is one example. Discharge is appropriate where the employer can demonstrate the previous use of progressive/corrective discipline to no avail. And, discharge is appropriate where the employer

can show that despite the lack of progressive/corrective discipline, the evidence indicates that reinstatement with a lesser penalty would not likely achieve positive results.

In the instant case, the Labor Agreement gives the arbitrator latitude to assess just cause. Violation of the "Alcohol and Drug Use Policy" will be "grounds for termination" (JX-2, Ex.8). The After-Care Plan Agreement does not mandate termination for a violation. Thus, the relevant documents do not limit the arbitrator to simply a consideration of guilt or innocence.

Prior discipline give Woods was related to his alcoholism. If the source of the problem has been

successfully attacked, then discharge makes no sense from a just cause perspective, despite previous discipline. If Woods, despite extensive treatment, is not judged to be a good bet for successful rehabilitation, discharge is appropriate regardless of his past record.

I view Woods as a good bet for successful rehabilitation so that discharge is not justified at this point in his treatment. Dr. Degner testified to a well-known fact – that relapses are an unfortunate reality in the treatment of chemical dependency. The attraction to alcohol or drugs is so strong that the road to total control and abstinence may have detours. Treating

each detour or relapse as cause for discharge may be counter-productive to the Company's sincere attempt to help employees fight chemical dependency.

I am not suggesting that no first-time relapse should bring discharge. Arbitrator Nicholas appropriately upheld a discharge in the case submitted by the Company with its brief. That grievant, who had undergone treatment for addiction to cocaine, lied about his cocaine use after rehabilitation. If after all the grievant had gone through he was not at the point of admitting a continuing problem, then prospects for achieving control of his dependency were slim. He was

not a good bet for reinstatement.

On the other hand, Woods, despite his admitted mistake, also owned up to his problem. I am impressed that he testified honestly and that since his relapse he seemingly has learned better how to deal with his environment. He has attended AA meetings, held a job and learned to live "one day at a time," which he must do is he is to control his dependency. Furthermore, his record with the Company was a good one for most of his tenure prior to rehabilitation and for the almost two months between his return and the termination.

Based on the record, Woods appears to be an

individual who will benefit from progressive/corrective discipline. But, mindful of his violations and of Dr. Degner's testimony that a violation of the after-care contract should bring serious consequences, only conditional reinstatement is viewed as an appropriate alternative to the discharge. No back pay is provided, in effect leaving Woods with a suspension of over a year. Surely this alternative discipline should be sufficient to impress upon Woods the necessity of avoiding future relapses and to send a signal to other employees that relapses during after-care will bring serious consequences.

APPENDIX C

AWARD

Thomas Woods was not discharged for just cause. He is to be reinstated without back pay to his former position. His reinstatement is conditioned upon receiving negative findings from an alcohol-drug screen. The grievant will present himself at the appropriate location for such a screen as soon as possible after being advised of this Award. The period between Woods' termination and reinstatement will count as part of the 60 months during which he may be subject to periodic and unannounced alcohol and drug testing. The arbitrator will retain jurisdiction of the case for the

sole purpose of clarification of the Award, if necessary.

/s/I. B. Helburn Arbitrator

Austin, Texas
August 23, 1991

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

GULF COAST INDUSTRIAL WORKERS UNION, Plaintiff,	)	
versus	)	*CIVIL ACTION H-91-2778*
EXXON COMPANY, USA, Defendant.	)	

FINAL JUDGMENT

1. Gulf Coast Industrial Workers Union takes nothing on its claim against Exxon Company USA.

2. On Exxon's counterclaim, the award of the

arbitrator is vacated.

Signed on December 11, 1991, at Houston, Texas.

/s/ Lynn N. Hughes
United States District Judge